

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ANTHONY J. BROOKS

Claimant

VS.

**BRIDGESTONE/FIRESTONE TIRE AND
RUBBER COMPANY**

Respondent

AND

OLD REPUBLIC INSURANCE COMPANY

Insurance Carrier

Docket No. 1,029,122

ORDER

Claimant appeals the August 2, 2006 Preliminary Decision of Administrative Law Judge Robert H. Foerschler. Claimant was denied benefits after the Administrative Law Judge (ALJ) found “a serious problem with notice of injury.”¹

ISSUES

Claimant raised the following issues in its Application For Review with the Board:

1. Did claimant suffer accidental injury arising out of and in the course of his employment with respondent?
2. Did claimant provide timely notice of the accident?

The ALJ, in the Preliminary Decision, limited his findings to the issue of notice. There was no determination regarding whether claimant suffered an accidental injury arising out of and in the course of his employment with respondent. Therefore, in this appeal, the Board will only consider the issue involving the timeliness of claimant’s notice to respondent. The Board is limited under K.S.A. 2005 Supp. 44-551 to reviewing issues presented to and decided by an administrative law judge.

¹ Preliminary Decision at 3.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, this Board Member finds the Preliminary Decision of the ALJ should be affirmed.

Claimant, a technician for respondent, alleges an accidental injury arising out of and in the course of his employment on November 1, 2005. Claimant testified that on that date, he was changing a tire on a truck, when the tire slipped. When claimant grabbed the tire to keep it from falling, he felt pain in his back. Claimant originally alleged a date of accident on September 9, 2005. However, when it was brought to his attention that September 9, 2005, was a Friday, and claimant did not work Fridays, claimant requested assistance from his service manager, Mike Frickey, in locating an invoice for the tire in question. He and Mr. Frickey found an invoice for a tire changed on a truck belonging to Joe's Pawn Shop, with an invoice date of November 1, 2005. Thereafter, claimant amended his alleged accident date.

Both Mr. Frickey and Greg Bowman, respondent's store manager, testified by deposition in this matter. Both acknowledged knowing that claimant had preexisting back problems. Mr. Bowman testified that claimant told him of his preexisting back problems on Mr. Bowman's first day on the job, in approximately January 2005. However, Mr. Bowman denied being told of any work-related accident on November 1, 2005. Mr. Bowman denied being made aware of a work-related accident until January 2006. Mr. Bowman stated that claimant did not miss any work in November 2005. Respondent's report of accident was filled out on January 4, 2006, showing a date of accident of September 9, 2005.²

After the accident report was completed, claimant was referred to Concentra Medical Centers in Lenexa, Kansas. The first examination report is dated January 6, 2006, and includes a history of an accident occurring on October 7, 2005. The history of how the accident occurred is consistent with claimant's testimony.

Claimant acknowledged a history of back problems. He had been treated by his family doctor, Dr. Kadouri, in November 2004 and had been given a back brace to wear. Claimant alleges he had several conversations with Mr. Frickey and Mr. Bowman regarding the work-related nature of his back injury. Mr. Bowman denies this conversation took place before January 2006. Mr. Bowman acknowledged that in January 2006, he was aware of the work-related accident claim for an injury in September or November 2005, stating that he was made aware when the report of accident was prepared, which, as noted above, was in January 2006.³

² Frickey Depo., Ex. 1.

³ Bowman Depo. at 16.

In addition to using the medical reports and respondent's representatives' testimonies to impeach claimant, respondent noted claimant's history of criminal convictions. Claimant was convicted of burglary, robbery and check fraud, and had spent 10 years in prison. However, at the time of the preliminary hearing, claimant had been out of prison for 5 to 6 years, was on parole with the State of Kansas, and had married and had three children.

Claimant alleged respondent failed to provide training as to what to do if a work-related injury was suffered. But both Mr. Bowman and Mr. Frickey testified that appropriate workers compensation notices were posted at respondent's business regarding what to do if injured. Copies of these notices are attached to Mr. Bowman's deposition as Exhibits 1 and 2.

In workers compensation litigation, it is the claimant's burden to prove his/her entitlement to benefits by a preponderance of the credible evidence.⁴

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁵

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.

The ALJ determined claimant had failed to prove that he provided timely notice of his alleged accident. Based upon this record, this Board Member agrees and affirms the denial of benefits at this time.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Decision of Administrative Law Judge Robert H. Foerschler dated August 2, 2006, should be, and is hereby, affirmed.

⁴ K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

⁵ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁶ K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this ____ day of October, 2006.

BOARD MEMBER

c: Steffanie L. Stracke, Attorney for Claimant
D'Ambra M. Howard, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge